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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of:)
)
 [REDACTED],) OHA Case No. 10-FH-218
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) completed and signed an application for Child Care Assistance Program (CCAP) benefits on March 2, 2010 (Exs. 3a-3i). The Claimant's application was received by Alaska Family Services, an agent of the State of Alaska Department of Health and Social Services, Division of Public Assistance (DPA or Division), on March 4, 2010 (Ex. 3a).¹

On May 6, 2010 Alaska Family Services (AFS) mailed to the Claimant a notice denying the Claimant's CCAP application (Ex. 16). The Claimant requested a fair hearing with regard to the Division's denial of her CCAP application on June 29, 2010 (Ex. 21a).

This Office has jurisdiction to decide this case pursuant to 7 AAC 49.010 and 7 AAC 41.440(c).

The Claimant's hearing was held on November 8, 2010 before Hearing Examiner Jay Durych. The Claimant participated in the hearing by telephone, represented herself, and testified on her own behalf. [REDACTED], a Program Coordinator I employed by the Division, participated in the hearing by telephone and represented and testified on behalf of the Division. The parties' testimonies were received and all exhibits introduced by the parties were admitted into evidence.

At the conclusion of the hearing the record was left open for post-hearing filings. The Claimant's post-hearing filing was due by November 23, 2010. The Division's post-hearing filing was due by

¹ The Claimant's application is hereafter referred to as the application of March 2, 2010.

December 7, 2010. No post-hearing filings were received from either party. On December 7, 2010 the record closed and the case became ripe for decision.

ISSUE

Was the Division correct when, on May 6, 2010, it mailed to the Claimant a notice denying the Claimant's application for Child Care Assistance Program benefits dated March 2, 2010, based on the assertion that the Claimant's proposed in-home caregiver had not completed the required background check application process by the applicable deadline (May 5, 2010)?

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence:

1. On March 2, 2010 the Claimant completed and signed an application for Child Care Assistance Program (CCAP) benefits (Exs. 3a-3i). The Application was received by the Division on March 4, 2010 (Ex. 3a).

2. On March 17, 2010 Alaska Family Services (AFS), an agent of the Division, mailed to the Claimant a notice (Ex. 8) which stated in relevant part as follows [format of original notice modified for brevity]:

The [CCAP application] we received on March 3, 2010 is incomplete. Submit the item(s) listed below by March 30, 2010 or your application may be denied. Item(s) needed: 1. Your choice of eligible child care provider . . . or for [REDACTED] to become an eligible provider. [Y]ou will need to supply us with the completed . . . Parent/In-Home Provider Agreement and the . . . In-Home Provider Caregiver Verification. We will also need a copy of [REDACTED]'s government-issued photo identification . . . This action is supported by 7 AAC 41.320.

3. On March 26, 2010 the Division received a completed In-Home Provider Caregiver Verification form signed by [REDACTED] (Exs. 9a, 9b), a completed Employment Eligibility Verification Form (I-9) signed by [REDACTED] (Ex. 10), and a completed Parent / In-Home Provider agreement signed by the Claimant and [REDACTED] (Exs. 11a, 11b).

4. On April 5, 2010 the Division mailed to [REDACTED] a letter advising him of his Background Check Unit (BCU) Provider Identification Number (PIN) and instructions on how to complete the background check (Ex. 13).

5. On April 9, 2010 Alaska Family Services mailed to the Claimant a notice (Ex. 14) which stated in relevant part as follows [format of original notice modified for brevity]:

The following information is needed to maintain your eligibility. Submit the items listed below by May 5, 2010 or your eligibility may be ended. Item(s) needed: 1. Your In-Home Caregiver . . . must complete the Background Check Unit (BCU) application process. Please find instructions for the BCU application process on the back of the [CCAP] In-Home Provider Caregiver Verification form. [Approval of] your In-Home caregiver cannot begin until they complete this process and this office

receives clearance from BCU This action is supported by 7 AAC 41.320. [Emphasis added].

6. On May 6, 2010 Alaska Family Services mailed to the Claimant a notice denying the Claimant's CCAP application (Exs. 16, 19(b)). The notice stated in relevant part as follows [format of original notice modified for brevity]:

The application for child care assistance we received on March 3, 2010 is denied. More information was needed to determine your eligibility. We sent you a notice listing the item(s) needed. We did not receive the following by May 5, 2010: Item(s) not provided: 1. In-Home caregiver [REDACTED] must complete the Background Check Unit (BCU) application process This action is supported by 7 AAC 41.315 and 7 AAC 41.320.

7. On May 20, 2010 the Claimant requested administrative review of AFS' May 6, 2010 denial letter (Ex. 19a). The Claimant wrote in relevant part that "to do it faster was not possible" and that she "had trouble with [the] Background [Check] Unit . . .". *Id.*

8. On May 26, 2010 DPA mailed to the Claimant a notice stating that the Division's prior (May 5, 2010) denial of the Claimant's March 3, 2010 application for CCAP benefits had been upheld on administrative review (Exs. 20a, 20b, 21b). This notice stated in relevant part as follows (Ex. 20(b)):

Records reflect that you did not provide the name of an eligible provider that you would be using and that you did not complete the background requirement process within the allowed timeframe of 30 days from when the PIN is issued Therefore the original decision . . . to deny your application for failure to renew is upheld

9. Alaska Background Check System records indicate that [REDACTED] submitted the last required item (a Release of Information / ROI) on May 27, 2010, and that he received provisional BCU approval on June 11, 2010 (Exs. 18, A-4).

10. DPA records indicate that *the Claimant* had previously completed a background check and obtained final BCU approval on April 15, 2010 (Ex. A-2). Accordingly, the Claimant was familiar with the background check process, having completed it herself.

11. On June 29, 2010 the Claimant requested a Fair Hearing (Ex. 21a). On her Fair Hearing request form the Claimant wrote that the reason for her hearing request was that "[b]ecause of family difficulties I think there could be an exemption on the time given to submit background check . . ." (Ex. 21a).

12. At the hearing of November 8, 2010 the Claimant testified in relevant part as follows:

a. She sent a money order to the Background Check Unit (BCU) to cover the fee. However, the amount of the money order was incorrect, so she had to send BCU another money order. This delayed the processing of [REDACTED]'s application.

b. She did everything she could do to get the information and documentation in on time. However, she misunderstood some of the processing instructions. English is not her native language.

c. She lives a hard life. She is taking care of nine children and working part time. Sometimes she doesn't have enough money to buy gasoline to drive into town.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

The party seeking a change in the status quo normally bears the burden of proof.⁴ The Claimant is considered to be attempting to change the status quo or existing state of affairs by obtaining benefits, and the Claimant therefore bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case.⁵ This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.⁶

II. Relevant Child Care Assistance Program Regulations.

The Child Care Assistance Program is established pursuant to Alaska Statutes ("AS") 47.25.001 - 47.25.095.

7 AAC 41.205, titled "Child Protection And Criminal History Check Requirements," provides in relevant part as follows:

(b) Except as provided in (c) and (d) of this section, to participate in the child care assistance program, a child care provider identified in 7 AAC 41.200(a)(1-6) must meet the applicable requirements of AS 47.05.300 - 47.05.390 and 7 AAC 10.900 - 7 AAC 10.990 (Barrier Crimes, Criminal History Checks, and Centralized Registry) for that provider and for each individual associated with that provider in a manner described in 7 AAC 10.900(b). If the provider requests and receives a provisional valid criminal history check under 7 AAC 10.920 for that provider or another individual, the department office responsible for approvals under this chapter will, or the designee shall, issue a provisional approval if the department or designee

⁴ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁵ A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

⁶ *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) ("Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true").

determines that the provider or other individual is otherwise eligible to provide care for children under this section

* * * * *

7 AAC 41.315(b) provides in relevant part as follows:

(b) Application, including a renewal application, must be made on a form prescribed by the department and must be submitted to the department or a designee, as appropriate, for review and approval.

7 AAC 41.320, titled “Family Responsibilities,” provides in relevant part as follows:

* * * * *

(b) If requested by the department or a designee, a family shall provide documentation to support information provided on the application or family responsibilities form.

(c) A family participating in the child care assistance program under this chapter shall (1) select an eligible provider

* * * * *

7 AAC 41.370, titled “Child Care in the Child’s own Home,” provides in relevant part as follows:

(a) To participate in the child care assistance program, an eligible family choosing to hire an in-home child care provider to care for the family's children in the family's home may hire an in-home provider *only if the provider has a valid criminal history check under AS 47.05.300 - 47.05.390 and 7 AAC 10.900 - 7 AAC 10.990, and is approved*

(b) The family shall submit to (1) the department office responsible for conducting criminal history checks all items required under 7 AAC 10.910(b) for the selected provider; and (2) the designee or to the department office responsible for approvals under this chapter, (A) a copy of a government-issued picture identification of the selected provider; (B) a verification signed by the selected provider, on a form prescribed by the department, that the selected provider (i) is the same person pictured on the identification; and (ii) is at least 18 years of age; and (C) a verification signed by the family, on a form prescribed by the department, that the selected provider (i) if approved under (c) or (d) of this section, will be employed by the family, and will care only for children who reside in the family's home; if fewer than five children are in the family, the provider may also care for the provider's children if the total number of all children in care does not exceed five; and (ii) has been provided with a copy of the materials listed under (h)(2) and (4) of this section.

* * * * *

(f) The department or designee will not approve under this chapter a selected provider who did not pass a background check unless (1) the department's determination changes upon reconsideration requested by the selected provider; or (2) the family requests a variance under 7 AAC 10.930 and the department grants the request under 7 AAC 10.935.

7 AAC 41.990, titled "Definitions," provides in relevant part as follows:

(a) In this chapter, unless the context indicates otherwise (2) "approved provider" means a provider described in 7 AAC 41.200(d) or (e) who has been found eligible to participate in the child care assistance program; (3) "approved in-home child care provider" means an in-home child care provider who is approved under 7 AAC 41.370(d) (23) "eligible provider" means a licensed provider or an approved provider determined by the department or a designee to be eligible to participate in the program (32) "in-home child care" means child care services provided in the child's own home by an approved in-home child care provider; (33) "in-home child care provider" means an individual who provides child care services in the child's own home; "in-home child care provider" does not include the child's parent; (34) "licensed provider" means a provider licensed under AS 47.32 and 7 AAC 57 (45) "provider" means (A) a provider licensed under 7 AAC 57; for purposes of this subparagraph, "provider" has the meaning given "day care facility" under AS 47.25.095; (B) a provider described in 7 AAC 41.200(a) (2), (3), and (4); (C) an approved provider; and (D) an approved in-home child care provider

III. Lack of Agency Discretion to Disregard Applicable Regulations.

An administrative agency is "bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure. Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

ANALYSIS

Introduction; Matter at Issue.

The Division's agent, Alaska Family Services (AFS), denied the Claimant's March 2, 2010 CCAP application on May 6, 2010 on the basis that the Claimant's designated In-Home caregiver, ██████████, had not completed the Background Check Unit (BCU) application process by the May 5, 2010 deadline (Exs. 16, 19(b)). The Division based its denial of the Claimant's application on the requirements of 7 AAC 41.315 and 7 AAC 41.320. *Id.*

Initially, it should be noted that Alaska Family Services' reminder notice to the Claimant, dated April 9, 2010 (Ex. 14), was clear about what was still required from the Claimant as of that date:

The following information is needed to maintain your eligibility. Submit the items listed below by May 5, 2010 or your eligibility may be ended. Item(s) needed: 1. Your In-Home Caregiver . . . must complete the Background Check Unit (BCU) application process.

The Claimant did not seriously dispute that the processing of [REDACTED]'s Background Check Unit (BCU) application was not completed by the May 5, 2010 deadline. Rather, she asserts that the Division should relax or dispense with strict enforcement of the application deadline under the circumstances of this case (Exs. 19a, 21a).

Accordingly, there are two issues to be determined in this case. The first issue is whether the relevant regulations generally require the Division to deny a CCAP application when a proposed in-home caregiver fails to timely complete the Background Check Unit (BCU) application process. The second issue is whether there is any exception to that rule and/or whether the Division has discretion to relax or dispense with strict enforcement of the application deadline under the circumstances of this case. These two issues will be addressed below in the order stated.

I. Do 7 AAC 41.315 and/or 7 AAC 41.320 Require the Division to Deny CCAP Applications When the Proposed In-Home Caregiver Fails to Timely Complete the Background Check Unit (BCU) Application Process?

The Division based its denial of the Claimant's application on the requirements of 7 AAC 41.315 and 7 AAC 41.320 (Exs. 16, 19b). Do one or both of these regulations support DPA's action?

7 AAC 41.315, the first of the two regulations referenced in the Division's denial notice, basically requires that all CCAP applicants submit a written application on forms prescribed by the department. In this case, it is clear that the Claimant *eventually* submitted all necessary forms (i.e. submitted them after the deadline for doing so) (Exs. 18, A-4). Accordingly, the Division's denial cannot be based on this regulation.

7 AAC 41.320, the second of the two regulations referenced in the Division's denial notice, states in relevant part that a family participating in the child care assistance program "shall provide documentation to support information provided on the application or family responsibilities form" (per subsection(b)), and "shall (1) select an eligible provider" (per subsection (c)).

Pursuant to 7 AAC 41.205(b) and 7 AAC 41.370 (a), a provider is not "eligible" for participation in CCAP until the provider has passed his or her background check. *See* text of regulations, set forth in the Principles of Law, above. In this case, it is not contested that [REDACTED], the Claimant's designated in-home care provider, did not submit the last required item (a Release of Information / ROI) to BCU until May 27, 2010, and did not receive provisional BCU approval until June 11, 2010 (Exs. 18, A-4). Thus, [REDACTED] was not an "eligible provider," for purposes of 7 AAC 41.320, until June 11, 2010. This was approximately 37 days *after* the May 5, 2010 deadline specified in Alaska Family Services' April 9, 2010 notice (Ex. 14).

In summary, because the Claimant's proposed in-home caregiver had not completed the required background check application process by the applicable (May 5, 2010) deadline, the Claimant had not selected an "eligible provider" by the May 5, 2010 processing deadline as required by 7 AAC 41.320. Accordingly, based on the text of that regulation, the Division was correct when on May 6, 2010 it mailed to the Claimant a notice denying the Claimant's March 2, 2010 application for Child Care Assistance Program benefits. The last issue is whether the Division has the discretion to relax or dispense with the requirements of 7 AAC 41.320 under the circumstances of this case.

II. Does the Division Have the Discretion to Relax or Dispense With the Requirements Of 7 AAC 41.320 Under the Circumstances of This Case?

The last issue is whether the Division has the discretion to relax or dispense with the requirements of 7 AAC 41.320 under the circumstances of this case.

7 AAC 41.320(c) states that the applicant “shall” select an eligible provider. The use of the word “shall” in the regulation makes the “eligible provider requirement” mandatory.²

When a regulation uses mandatory language, an agency is bound to follow it. *See Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010). In that case the court stated that an administrative agency is “bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure,” and that “[a]dministrative agencies are bound by their regulations just as the public is bound by them.” *Id.*

In summary, because of the mandatory language used in 7 AAC 41.320, the Division does not have the discretion to relax the requirement that an applicant for CCAP benefits select an eligible provider. The Claimant’s designated in-home caregiver had not attained “eligible provider” status by the deadline specified by the Division. Accordingly, the Division was correct when, on May 6, 2010 it mailed to the Claimant a notice denying the Claimant’s application for Child Care Assistance Program benefits dated March 2, 2010, because the Claimant’s in-home caregiver had not completed the required background check application process by the May 5, 2010 deadline.

CONCLUSIONS OF LAW

1. Pursuant to 7 AAC 41.320(c), a family participating in the Child Care Assistance Program is required to “select an eligible provider” to provide in-home child care services.
2. Pursuant to 7 AAC 41.205(b) and 7 AAC 41.370 (a), an applicant’s proposed in-home care provider is not an “eligible provider” for purposes of CCAP until the provider has passed his or her background check.
3. The Claimant failed to carry her burden and did not prove, by a preponderance of the evidence, that her proposed in-home care provider had completed the required background check application process by the applicable (May 5, 2010) deadline. Accordingly, the Claimant’s proposed in-home care provider had not attained “eligible provider” status by the May 5, 2010 deadline specified in the Division’s notice dated April 9, 2010.
4. Accordingly, the Division was correct when on May 6, 2010 it mailed to the Claimant a notice denying the Claimant’s application for Child Care Assistance Program benefits dated March 2, 2010, because the Claimant’s proposed in-home caregiver had not completed the required

² Webster’s New World Dictionary of the American Language (Second College Edition 1970) defines “shall” at p. 1307 in relevant part as “compulsion, obligation, or necessity . . .”. The American Heritage Dictionary of the English Language (Houghton Mifflin Co. 1978) defines “shall” at p. 1189 in relevant part as “compulsion, with the force of must . . .”. Black’s Law Dictionary (West Publishing, Fifth Edition, 1979) defines “shall” at p. 1233 in relevant part as “generally imperative or mandatory . . .”. Webster’s II New Riverside University Dictionary (Riverside Publishing Co. 1994) defines “shall” at p. 1070 in relevant part as “a directive or requirement . . .”.

background check application process (and thus had not attained “eligible provider” status) by the applicable deadline (May 5, 2010).

DECISION

The Division was correct when on May 6, 2010 it mailed to the Claimant a notice denying the Claimant’s application for Child Care Assistance Program benefits dated March 2, 2010, because the Claimant’s proposed in-home caregiver had not completed the required background check application process (and thus had not attained “eligible provider” status) by the applicable deadline (May 5, 2010).

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 10th day of January, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 10th day of January 2011 copies of the foregoing document were sent to the Claimant by U.S.P.S mail, and to the remainder of the service list by e-mail, as follows:

Claimant – via Certified Mail, Return Receipt Requested.
[REDACTED], DPA / CCPO Fair Hearing Representative

[REDACTED], Acting Director, Division of Public Assistance
[REDACTED], Chief of Field Services
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Administrative Assistant II
[REDACTED], Eligibility Technician I

(signed)

J. Albert Levitre, Jr., Law Office Assistant I